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835-997—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1026

GEORGE ZIMMERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court certifying that the motion for a new trial on the ground of newly discovered evidence would be denied if the case was remanded by the court of appeals for a ruling thereon (Pet. App. 17–19) is not reported. The opinion of the court of appeals sustaining that determination and affirming the conviction (Pet. App. 20–34) is reported at 374 F. 2d 241. The opinion of the district court denying the motion to vacate and reconsider its prior order (Pet. App. 35–42) is not reported. The *per curiam* opinion of the court of appeals affirming the

denial of the motion to vacate and reconsider (Pet. App. 43–44) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1969 (Pet. App. 44). The petition for a writ of certiorari was filed on February 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after the denial of a motion for a new trial has been affirmed on appeal, a defendant may obtain a new hearing on that motion on the ground that, because of the death of the reporter, the minutes of the original hearing had not been available to the court of appeals, when no claim was made during the pendency of the appeal that the trial judge's summary of the evidence was either inaccurate or insufficient and no effort was made to obtain a more extensive statement of the evidence.

STATEMENT

1. Following a non-jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on counts 4 and 5 of a five-count indictment (R. 1)[1] charging that he and a codefendant named Leonard Luxenberg conspired with one Mervin Gold willfully to misapply $28,000 of the funds of Cosmopolitan Small Business Investment Company, Inc.,

[1] "R." refers to the stamped numbers appearing on the initial pages of the documents contained in the clerk's transcript. "Tr." refers to the reporter's transcript of the trial.

a small business investment company licensed by the Small Business Administration, in violation of 18 U.S.C. 371 and 657 (count 4), and that they aided and abetted Gold in the commission of that substantive offense (R. 151).[2] On June 23, 1965, petitioner was sentenced to 18 months' imprisonment on each count, to run concurrently, and fined $5,000 (R. 172).[3] On February 17, 1967, the court of appeals affirmed (Pet. App. 20–34; 374 F. 2d 241).

The evidence[4] showed that petitioner, an attorney knowledgeable in the operations of the Small Business Administration (SBA), did the legal work, at Gold's request, of incorporating Cosmopolitan Small Business Investment Company, Inc. (Cosmopolitan), and applying to the SBA on its behalf for a license to make loans to small business concerns. Although Gold was the organizer and manager of Cosmopolitan, his name did not appear in any of the documents sub-

[2] Luxenberg, who was tried jointly with petitioner, was also convicted on counts 4 and 5 (R. 151). Gold, who was named as a defendant in all five counts, and whose case was severed as to counts 1, 2, and 3 at the instance of petitioner and Luxenberg (R. 28), had previously been convicted by a jury on each of those counts (R. 108), none of which is involved here. Gold (now deceased) was evidently never tried on counts 4 and 5.

[3] Following the affirmance of the conviction by the court of appeals and pursuant to a motion for reduction under Rule 35 of the Federal Rules of Criminal Procedure, the sentence was amended to provide that the confinement was to be subject to 18 U.S.C. 4208(a)(2) (making the prisoner eligible for parole whenever the Board of Parole deems it appropriate) (R. 193, 198).

[4] See the court of appeals' summary at Pet. App. 21–22, 32–33 (374 F. 2d at 245, 250); the findings of fact made by the trial judge in announcing the verdicts (Tr. 688–694; Tr. 108).

mitted to the SBA. In addition, certain of the documents (prepared by others) accompanying the application for the license falsely represented that Cosmopolitan had $155,000 on deposit in a bank account. Pursuant to Cosmopolitan's request, submitted by petitioner, the SBA issued to the corporation a loan license and "matching funds" in the amount of $150,000. Thereafter, petitioner assisted Gold in causing Cosmopolitan to make a $28,000 loan to a company that was wholly owned by Luxenberg, knowing that the loan was made without adequate security. Out of the proceeds of the $28,000, Luxenberg gave Gold two checks, totaling $26,000, which Gold deposited in his personal account, thus converting the funds to his own use. The remaining $2,000 was used by Luxenberg in his own business. The alleged loan of $28,000 by Cosmopolitan to Luxenberg's company, for which Luxenberg, as president, executed a promissory note, was never repaid.

2. On June 22, 1965, nineteen months after he was found guilty and the day preceding the imposition of sentence,[5] petitioner filed in the district court a motion for a new trial on the ground of newly discovered evidence, supported by an affidavit by Fred Garmone, a former attorney for Gold in connection with a different criminal matter. Garmone stated in the affidavit that Gold—who was then deceased—had told him, subsequent to the termination of his employment as counsel, that petitioner and Luxenberg

[5] Petitioner had made one prior motion for a new trial and it appears from the docket entries that the delay between verdict and sentence resulted, in part, from the consideration of that motion and proceedings relating to the codefendant.

"were dupes" of his in the transactions involved in this case (R. 171; see Pet. App. 18). The district court took no action on the motion during the pendency of petitioner's appeal from his conviction until the court of appeals requested the trial court to advise it whether it would grant the motion if the case was remanded for a ruling thereon (R. 184). On April 1, 1966, pursuant to this request, the trial judge held an evidentiary hearing at which petitioner presented two witnesses—James Willis, a former attorney for Gold in connection with the instant criminal proceedings, and A. H. Zychick, also a lawyer, who, in association with Garmone, had represented Gold in the unrelated criminal case referred to above. Garmone had died prior to the hearing (Pet. App. 17, 18).

On April 22, 1966, the trial judge filed a memorandum opinion certifying that he would deny the motion for a new trial if the case was remanded (Pet. App. 17–19). In the opinion the court summarized the testimony of attorneys Willis and Zychick[6] as follows (Pet. App. 17–18):

> * * * Mr. Willis testified that, pursuant to a request made by Mr. Gold, he contacted the United States Attorney and proposed a "deal" whereby various criminal cases pending against Mr. Gold could be resolved. According to Mr. Willis, he was authorized to propose to the United States Attorney that Mr. Gold would enter a plea of guilty to certain charges then pending if an arrangement could be worked out whereby a previous sentence of eight years

[6] The opinion also summarized the pertinent averments of Garmone's affidavit (Pet. App. 18), which were essentially identical with the live testimony given by Zychick.

> could be reduced and Mr. Gold be given the right to select the penitentiary to which he would be sent. Mr. Willis further testified that Mr. Gold authorized him to state to the United States Attorney that he would give a statement exonerating the other parties who had been indicted along with himself. Mr. Gold's proposal was flatly refused by the United States Attorney.
>
> * * * Mr. Zychick testified that following the termination of his and Mr. Garmone's employment as counsel for Mr. Gold, Mr. Gold would often drop into his office to use the phone and visit with either himself or Mr. Garmone. Mr. Zychick testified that on some of these occasions Mr. Gold made statements concerning Mr. Zimmerman and Mr. Luxenberg. According to Mr. Zychick, Mr. Gold made derogatory comments with regard to Messrs. Zimmerman and Luxenberg and boasted that he had made dupes out of them.

The trial judge certified that he would not order a new trial in the event of a remand because he was of the opinion that the proffered evidence was not of such a character as would probably result in a verdict of not guilty at a new trial (Pet. App. 18–19). "Viewing the evidence offered in support of the motion for a new trial in conjunction with all of the evidence elicited at the trial," he concluded (Pet. App. 19),

> the Court finds that the alleged statements attributed to Mr. Gold to the effect that Mr. Zimmerman and Mr. Luxenberg were dupes is not worthy of credence. While Mr. Gold's role in the unlawful activities might have been more

> substantial than that of either Mr. Zimmerman or Mr. Luxenberg, the Court finds nonetheless that the Government has established, beyond a reasonable doubt, that Messrs. Luxenberg and Zimmerman [were guilty as charged].

At the hearing on the motion for a new trial, petitioner's counsel had sought to elicit from attorney Willis certain information which Gold had allegedly communicated to Willis while he was Gold's lawyer, and which it was contended would exonerate petitioner. After satisfying himself through inquiry that the information in question had been communicated to Willis by Gold "in the context of" their attorney-client relationship, the judge ruled that, notwithstanding Gold's intervening death, Willis would neither be required nor permitted to divulge it (Pet. App. 36–37, 42; Pet. 6, 8).

The court reporter who recorded the proceedings at the hearing died shortly following the filing of the judge's opinion, without having transcribed his notes (Pet. App. 37). Subsequent efforts by petitioner to find someone who could decipher the notes were unsuccessful (Pet. 5–6). As a consequence, the judge's summary of the testimony of attorneys Willis and Zychick at the hearing, as set forth above, is the only record of their testimony.

3. In his appeal from the denial of the new trial motion, petitioner at no time contested the trial judge's decision not to require disclosure of the privileged information which Gold had communicated to attorney Willis as his lawyer (Pet. App. 39). The only error alleged was the refusal to grant a new trial on the

basis of the "non-privileged" statements of Gold to the attorneys (Pet. App. 38). Also, although petitioner alluded in his brief to the death of the court reporter and the consequent unavailability of a transcript of the testimony taken at the hearing,[7] he did not suggest that the judge's summary of the testimony was either inaccurate or insufficient (Pet. App. 39). No request was made that the court of appeals defer decision of the appeal until a transcript became available, or until a settled and approved reconstructed record could be obtained (see *infra,* pp. 11–12), nor was it ever suggested that the absence of a transcript was prejudicial (R. 205, Memorandum, p. 3).

The court of appeals affirmed petitioner's conviction—and the refusal to grant a new trial—on February 17, 1967 (Pet. App. 20–34; 374 F. 2d 241). On May 19, 1967, petitioner filed a petition for rehearing of the appeal, but petitioner again made no claim that the absence of a transcript of the testimony taken at the hearing had prejudiced his appeal on that issue—indeed the absence of a transcript was not mentioned. Similarly, the petition did not raise any question as to the propriety of the trial judge's ruling on the "privileged communication" issue (Pet. App. 39–40). The petition was denied and review by this Court was not sought.

4. On July 17, 1967, after the district court had granted a motion by petitioner for a reduction of his sentence under Rule 35 of the Federal Rules of Crim-

[7] He advised the court that efforts were being made to find someone who could transcribe the deceased reporter's notes and that a transcript would be provided as soon as one was available.

inal Procedure to the extent that the sentence was amended to provide that it was to be subject to 18 U.S.C. 4208(a)(2) (making him immediately eligible for parole) (R. 193, 198), petitioner filed in the district court a motion to vacate and reconsider the denial of the motion for a new trial (R. 199). The motion alleged that, owing to the unavailability of a transcript of the proceedings on the motion for a new trial, petitioner (1) had been precluded from obtaining "effective appellate review" of the denial and (2) had been prevented from effectively litigating in the court of appeals the question whether the trial judge's decision of the "privileged communication" issue had deprived petitioner of compulsory process for obtaining witnesses in his favor in violation of the Sixth Amendment. On January 22, 1968, the trial judge filed a memorandum opinion denying the motion (Pet. App. 35–42). He held that, because his decision denying the motion for a new trial had become final and had been affirmed by the court of appeals, he had no authority to vacate or reconsider it (Pet. App. 41). He further indicated, however, that even if he had power to grant the motion he would deny it as a matter of discretion for lack of merit (Pet. App. 41–42). The court of appeals affirmed (Pet. App. 43–44).

ARGUMENT

Since the order denying the motion for a new trial had become final and had been affirmed by the court of appeals, the trial judge correctly held that he had no authority—without the court of appeals' permission—

to vacate and reconsider the denial. *United States* v. *Smith,* 331 U.S. 469. In any event, as the trial judge noted, and as the court of appeals essentially held,[8] the motion to vacate had no merit.

1. The principal claim of the motion to vacate—that the unavailability of a transcript of the testimony taken at the hearing on the motion for a new trial had precluded petitioner from obtaining "effective appellate review" of the order of denial—was both insubstantial and a patent afterthought.

The essential aspects of the testimony of attorneys Willis and Zychick at the hearing—including Zychick's testimony that Gold had told him that he had made "dupes" of petitioner and Luxenberg in the transactions involved at bar—were summarized in the trial judge's memorandum opinion. At no time during the appeal from the judge's denial of a new trial did petitioner claim or suggest that the judge's summary of the witnesses' testimony was either inaccurate or lacking in pertinent detail. While the record reflects that at the time petitioner filed his court of appeals brief he was still hopeful that he would be able to find someone who could transcribe the deceased reporter's notes, at no time during the pendency of the appeal did petitioner either ask the court to defer its decision of the appeal until a transcript could be obtained or suggest that the available record materials were deficient as a basis for decision. Not even after the court of appeals had af-

[8] The court of appeals treated the denial of the motion by the trial judge as having been made in the exercise of discretion and found "no abuse" in the ruling (Pet. App. 44).

firmed the conviction and the contested order did petitioner suggest that he had been prejudiced by the absence of a transcript. It is significant that petitioner does not even now suggest any respect in which the trial judge's summary of the testimony was inadequate as a basis for appellate review (Pet. 9–12).

If petitioner had thought that the trial judge's summary of the testimony adduced at the hearing was an inadequate basis for decision of the appeal, there were means at his disposal for securing a more adequate record. Former Rule 75(c) of the Federal Rules of Civil Procedure (now Rule 10(c) of the Federal Rules of Appellate Procedure)—which during the pendency of the appeal [9] was applicable to criminal appeals under former Rule 39(b)(1) of the Federal Rules of Criminal Procedure [10]—provided that, if no transcript of the proceedings was available the parties to an appeal could prepare a statement of the evidence from the best sources available, including their recollections, and submit it to the trial court for settlement and ap-

[9] Rule 75(c) became effective as of July 1, 1966, at which time the appeal from the denial of the motion for a new trial was pending (the oral argument had not yet been heard, see R. 205, Memorandum, p. 1). The substance of the Rule had in any event been previously contained, without significant variation, in Rule 75(n).

[10] Rule 39(b)(1) provided: "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules." Rule 39 was abrogated, effective as of July 1, 1968, because its provisions are now covered by the Federal Rules of Appellate Procedure (see Note of the Advisory Committee).

proval; and that, as settled and approved, the statement would constitute the record of the proceedings."[11] Since petitioner took no steps under that authorized procedure to secure a more complete record of the testimony taken at the hearing than that contained in the trial judge's summary, he cannot now be heard to complain that he was prejudiced by the absence of a transcript.

2. What we have said applies with equal force to petitioner's contention (Pet. 12–14) that because of the absence of a transcript he was precluded from effectively litigating in the court of appeals the question whether the trial judge's decision of the "privileged communication" issue violated petitioner's Sixth Amendment right to compulsory process for obtaining evidence in his favor. That contention was not raised in petitioner's appeal from the denial of a new trial and petitioner's suggestion that the absence of a transcript prevented him from even seeeking review of that issue (Pet. 14) is clearly unsound. Had he deemed the record inadequate for presentation of the issue, he

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[11] The rule, specifically, provided:

"(c) *Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable.*

"If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

could have taken steps to obtain a settled and approved reconstructed record under the procedure referred to above. In any event, the trial judge's ruling that the attorney-client privilege belongs to and is waivable only by the client, and survives the death of the client, was correct. 8 Wigmore, *Evidence* (3d ed. 1940), §§ 2321, 2323; 3 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 800, 812, 813; 2 Underhill, *Criminal Evidence* (5th ed. 1956), §§ 328, 333.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

MARCH 1969.

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[12] In *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner at Pet. 13, the Court expressly noted that nothing in the opinion was to be construed as disapproving testimonial privileges, including the attorney-client privilege, since such privileges are based on different considerations from those underlying the common-law disqualifications for interest, involved in that case (388 U.S. at 23, n. 21).

U.S. GOVERNMENT PRINTING OFFICE: 1969